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In the Supreme Court of the United States

OCTOBER TERM, 1945

Nos. 162 and 163

H. MOFFAT COMPANY (a corporation),
Petitioner and Appellee below,

v.

SOUTHERN PACIFIC COMPANY (a corporation),
Respondent and Appellant below.

UNION SHEEP COMPANY (a corporation),
Petitioner and Appellee below,

v.

SOUTHERN PACIFIC COMPANY (a corporation),
Respondent and Appellant below.

(Consolidated Cases)

Brief in Opposition to Petition for Writ of Certiorari to the Circuit Court of Appeals for the Ninth Circuit

Respondent, plaintiff in the trial court, respectfully submits this brief in opposition to the petition for writ of certiorari in these consolidated cases.

For convenience and better understanding we will refer herein to the parties by their designation in the trial court. The pleadings in the two cases are counterparts and both

cases were tried on one record. The evidence is contained in the record in No. 162. References to the record are to No. 162, unless otherwise indicated.

The statement of facts in defendants' petition is correct as far as it goes, but some important facts affecting the result are omitted and we therefore respectfully direct attention to the following:

Plaintiff is an interstate common carrier by railroad, and as such is subject to the provisions of the Act of Congress known as the "28-Hour Law", copy of Sections 1 and 2 of which is set forth in the attached appendix. This Act is designed to prevent cruelty to animals in transit, and the duty of compliance with its requirements is placed on the carrier. Livestock in transit must be unloaded into properly equipped pens for rest, water and feeding within a period of 28 hours, except that the time of confinement may be extended to 36 hours in specified circumstances not here involved. Under Section 2, animals so unloaded shall be properly fed and watered during such rest period—

> "either by the owner or person having the custody thereof, or in case of his default in so doing, then by the railroad * * * transporting the same, at the reasonable expense of the owner or person in custody thereof, and such railroad * * * shall in such case have a lien upon such animals for food, care, and custody furnished, collectible at their destination in the same manner as the transportation charges are collected, * * * but nothing in this section shall be construed to prevent the owner or shipper of animals from furnishing food therefor, if he so desires."

At the times involved herein, plaintiff employed the Western Livestock Service Co., a corporation, as its agent

to perform all required services of unloading, loading, watering, feeding and caring for livestock in transit at its Sparks, Nev., corrals.[1] The outstanding stock of this corporate agent was held 80% by Swift & Co. and 20% by C. J. Behn, as nominee of Armour & Co. (R. pp. 287, 288).

At the request of defendants (petition, p. 3), plaintiff caused certain of the livestock shipped over its line by defendants to be unloaded at plaintiff's stockyards at Sparks, Nev., where the stock was rested, fed and watered by the service company for plaintiff's account. Bills for the feed supplied and services rendered were submitted in due course to plaintiff and paid, and in turn the identical amounts paid out by plaintiff were billed to the defendants, who declined payment. These suits followed.

The complaints are in conventional form and contain two counts, the first seeking recovery of the amounts claimed under terms of specified tariffs on file with the Interstate Commerce Commission and the second in the form of *quantum meruit* to recover what the services were reasonably worth. Attached to each complaint is a detailed statement, marked Exhibit F, showing the dates the services were performed, the car numbers, the freight bill numbers, the origins and destinations, and the amounts claimed to be due for each shipment, including hay furnished, the cost of said hay to plaintiff being the amount charged therefor by the service company which said service charges were made in accordance with described tariff schedules (R. p. 33 *et seq.)*. This entire allegation was

(1) This it had the right to do. *United States v. Fruit Growers Express Co.*, 279 U.S. 363, 368.

admitted to be true by paragraph III of defendants' answer and counterclaim (R. p. 77), although defendants denied liability on the ground that the charges sought to be collected were unreasonable, unjust and excessive, in violation of Title 45 U.S.C.A., Sections 71 and 72 (R. p. 82). They also sought to be relieved on the further ground that the contract between the plaintiff and its service agent, the Western Livestock Service Co., was violative of the provisions of Title 49 U.S.C.A., Section 41, paragraphs (1) and (2), Section 1, paragraphs (5) and (6), Sections 2 and 3, paragraph (1), and Section 6, paragraph (7) of said Act (R. pp. 88, 89, 90). Accordingly, defendants prayed for a decree declaring the contract to be null and void and enjoining plaintiff from entering into any contract similar in character (R. p. 90). Plaintiff answered the counterclaim, questioning the jurisdiction of the court to initially consider the legality of the service contract (R. pp. 119, 120).

During the pendency of the cases in the trial court, defendants voluntarily paid all the service charges as specified in the tariffs attached to the complaints (R. p. 540), but left unpaid the charges for hay sought to be collected herein.

At the trial, and over plaintiff's objection (R. p. 198), the service contract was received in evidence.[2] Although plaintiff did not rely at all upon the contract, the trial court nevertheless held it to be violative of Sections 2 and

(2) This collateral matter was improperly received and considered by the trial court and was properly disregarded by the Court of Appeals. *Loughran v. Loughran*, 292 U.S. 216, 218; *Planters Bank v. Union Bank*, 83 U.S. 483, 499-500; *Franklin v. Mortgage G. & S. Co.* (CCA 9), 57 F. (2d) 834.

3 of the Interstate Commerce Act, 49 U.S.C.A., Sections 2 and 3, and on that ground orginally held that the plaintiff was not entitled to recover an amount in excess of the actual net cost to Swift & Co. for similar services during the time in question (R. pp. 127-128). As the evidence then before the court failed to show such cost, the submission was vacated and further evidence taken. The trial court thereupon filed its final decision, in which it stated:

> "The evidence, as finally submitted, establishes the fact, beyond controversy, that Western Livestock Company, during the time of operations in question, operated the said livestock feeding and resting yards of plaintiff at a net profit of $12,789.00. This profit, however, is in addition to payment of all costs of livestock shipments through the said Sparks yards, made by Swift & Company and Armour & Company, capital stock owners of said Western Livestock Company. [66]
>
> It is the conclusion of the Court that plaintiff is not entitled to any judgment against defendant and that the case should be dismissed, subject to payment of defendant's costs herein incurred." (R. pp. 130-131)

We will not pause to point out factual defects in the trial court's conclusions, but we mention only that, after entry of judgments for defendants, plaintiff applied for a new trial, which was denied on the ground that the contract referred to presented "a situation clearly discriminatory" (R. p. 144).

On appeal to the U.S. Circuit Court of Appeals for the Ninth Circuit, the judgments were reversed with costs to plaintiff. In the course of its opinion, 154 F. (2d) 877, the Court of Appeals said:

"Appellant and appellees agree that appellant was entitled to recover the reasonable cost of the feed furnished. Such is the intent of the statute (note 1).

Upon the facts alleged by appellant, and admitted by appellees, appellant was entitled to a judgment against each appellee for the reasonable value of the feed furnished by the Livestock Company to such appellee. The trial court made a finding that from the evidence introduced, it could not determine such reasonable value. The fact remains, however, that appellees were furnished the feed and received the benefit thereof. Appellant paid the Livestock Company for said feed. To permit appellees to retain such benefit at the expense of appellant would be an unjust discrimination in their favor.

The judgments are reversed and the causes remanded with directions to the lower court to find the reasonable value of the feed furnished by the Livestock Company to each appellee and, thereupon, to enter judgments in favor of appellant for the reasonable value of the feed as found by it. In the event the trial court is unable to find such reasonable value from the evidence now incorporated in the record, it is directed to reopen the case to permit the introduction of further evidence of the reasonable value of the feed furnished. As to the amount of feed furnished, we think a consideration of all the evidence before the court establishes the fact that appellees' livestock were fed at least the minimum required by the Department of Agriculture—200 pounds of hay per carload shipment of cattle and 100 pounds per deck for sheep.

Judgments reversed." (R. in No. 163, pp. 136-137)

Defendants seek reversal on two grounds, i.e. that the Court of Appeals erred in—

(a) Remanding the case to take further evidence concerning the reasonable value of feed supplied; and

(b) In not assessing costs against plaintiff and appellant (petition, p. 14).

We will answer in the order in which the points relied upon have been stated.

ARGUMENT

I.

PETITIONERS ERR IN ARGUING THAT PLAINTIFF MADE NO EFFORT TO SUPPLY THE REQUIRED EVIDENCE IN THE DISTRICT COURT, AND THAT THE COURT OF APPEALS SHOULD HAVE MERELY AFFIRMED THE JUDGMENT FOR FAILURE OF PROOF. THE FACT OF SERVICE RENDERED WAS ADMITTED AND AMPLE, COMPETENT AND UNCONTRADICTED EVIDENCE OF VALUE IS ALREADY IN THE RECORD.

Two facts stand out in connection with the petition. First, the defendants seek to evade payment for feed admittedly supplied to their livestock upon their request (petition, p. 3) and pursuant to the mandatory requirements of the "28-Hour Law"; second, they have completely abandoned the ground on which the case turned in their favor in the District Court, namely, that the contract between the livestock service agent and the plaintiff railroad constituted a rebating device in favor of Swift & Co. and Armour & Co.

It will be noted that the decision of the Court of Appeals directs the trial court to find the reasonable value

of the feed furnished by the plaintiff to each defendant, and thereupon to enter judgments in favor of plaintiff for the reasonable value of the feed as found by it (R. in No. 163, pp. 136-137). Further proceedings are required only in the event the trial court is unable to find such reasonable value from the evidence now in the record.

We desire to emphasize that the mandate for further proceedings is not an imperative command forthwith to conduct them, but is conditional only. It will be the duty of the trial court, on the filing of the mandate and motion for judgment in accordance therewith, to consider the record, and to conduct a further hearing only if it should not find sufficient evidence of value in the record as made. It seems hardly necessary for us to point out that, under 28 *U. S. C.*, sec. 391 (Judicial Code, sec. 369), the Court of Appeals was authorized to give Judgment without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties. Generally speaking, a new trial follows on reversal of a judgment without more, and the Court of Appeals was well within its rights in conditionally directing a limited new trial as to a distinct, separate issue, such as the reasonable value of the feed supplied, without retrial of the entire case.[3]

It is the view of the plaintiff that no further hearing will be necessary to establish the reasonable value of the feed admittedly furnished and consumed by defendants' livestock, for ample, competent and uncontradicted evidence of such value is now in the record (R. pp. 168, 169, 170). Upon that legally sufficient evidence the trial court may make appropriate findings required by the mandate

(3) *Gasoline Products Co. v. Champlin Ref. Co.*, 283 U.S. 494.

of the Court of Appeals.[4] But if not, no prejudice will be suffered by allowing plaintiff the right to supplement the record with additional evidence which the defendants may meet the best they can.

Notwithstanding the precise language of Section 2 of the "28-Hour Law", it was defendants' untenable position in the trial court that plaintiff was not entitled to recover the reasonable value of the hay supplied by it, but only the bare out-of-pocket field cost of the hay to its service agent; and the trial court first agreed with that view (R. p. 128). In its brief in the Circuit Court of Appeals, the defendants and petitioners stated their position to be as follows:

> "* * * appellees contend that no profits were authorized to be made by the railroad or its agent on the hay fed in the absence of a tariff therefor filed with the Interstate Commerce Commission." (p. 35)

In its final decision, the trial court held that plaintiff was not entitled to recover at all simply because a profit had been realized by its service agent out of the latter's entire business (R. pp. 130-131), including income from bedding livestock cars, furnishing rope and panels and for servicing in other particulars (R. pp. 289, 290, 291). The trial court utterly misconceived the evidence when it concluded that Armour and Swift had had their livestock serviced and fed without cost to them, as it is uncontestable that each of them paid the same charges as all other shippers. It was for this reason that the Circuit Court of Appeals

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(4) *Meyer v. United States* (CCA 9), 220 Fed. 800; *Hudson v. Railroad* (Iowa), 60 N.W. 608; *Siegbert v. Stiles*, 39 Wis. 533, 536; 20 *Am. Jur.*, title "Evidence", sec. 372.

found that the effect of the trial court's final judgment was to create an actual discrimination in favor of the defendants by giving them their hay free, at plaintiff's expense, whereas all other shippers at the same time paid the identical charges sought to be recovered herein (R. in No. 163, p. 136; 154 F.(2d) 877, 878-879).

It seems unnecessary for us to point out that the statutory expression "reasonable expense" used in Section 2 of the "28-Hour Law" means reasonable value, for to hold otherwise would require the court to entirely disregard the word "reasonable" and convert "expense" to "cost". If so construed, it would give rise to grave doubts respecting its constitutionality, inasmuch as plaintiff may not be forced to do business at bare cost.[5]

There can be no doubt that the record contains ample evidence on the question of reasonable value and this fact is conceded in the defendants' brief in the Circuit Court wherein the following passage appears:

> "The fact that the evidence showed similar charges for hay were made at certain other points in the west is not controlling as to the reasonableness of the charges here made. The witness McGanney, who testified as to the charges made at these other points, stated he had no information as to the cost of hay at the places mentioned, and further testified in effect that contracts similar in tenor with the one here involved was also in effect at most of the places he mentioned." (p. 37)

It appears unnecessary for us to burden the court with a discussion on the decisions cited on pages 17, 18 and 19

(5) *N. P. R. Co. v. North Dakota*, 236 U.S. 585; *So. Ry. Co. v. St. Louis Hay & G. Co.*, 214 U.S. 297.

of the petition, in which reversals were refused when plaintiff failed to meet the burden of proof of an essential part of his case, for they are not in point. We have already referred to the uncontradicted evidence of reasonable value now in the record. We respectfully submit that it was the defendants themselves who led the trial court into making its erroneous judgments by injecting a purely collateral issue into the cases concerning the legality of the service contract.

II.

THE COURT OF APPEALS PROPERLY TAXED THE COSTS OF APPEAL AGAINST PETITIONERS, THE LOSING PARTIES.

Ninth Circuit Court Rule 27(3) provides that on reversal of any judgment or decree costs shall be allowed to the appellant, including the cost of the transcript from the court below, unless otherwise ordered. Although they are the losing parties, defendants nevertheless say that the costs should be borne by plaintiff because the reversal was occasioned by its fault, as it assertedly failed to supply the necessary evidence of reasonable value on which a proper judgment could have been rendered in the first instance. As already shown, defendants disregard the uncontradicted, abundant evidence of reasonable value to which reference is made on page 8 hereof; and they ignore the fact that it was themselves who misled the trial court into its erroneous judgments by insisting that the contract between plaintiff and its livestock service agent was illegal and therefore exonerated defendants from all liability to

pay for the feed supplied to their livestock under Section 2 of the "28-Hour Law" and at their request. Plaintiff's right of action stemmed from the mandatory provisions of Federal law, not from the assertedly illegal service contract, which the trial court erroneously thought was "clearly discriminatory" (R. p. 144).

Not only was the question whether the service contract amounted to a rebate to Swift and Armour and "discriminatory", one primarily within the jurisdiction of the Interstate Commerce Commission, and therefore beyond the initial jurisdiction of the trial court,[6] but, under the authority cited in footnote 2 hereof, it was improperly considered in defense of these actions brought solely under Section 2 of the "28-Hour Law".

The cases relied upon by defendants, which hold that where a judgment is reversed for failure of appellant to make the jurisdiction appear, reversal will be at his cost on appeal, are clearly not in point.

In conclusion, we desire to respectfully point out that a review on a writ of certiorari is not a matter of right but of sound judicial discretion, and will be granted only where there are special and important reasons therefor which are wholly lacking in the instant proceeding. None of the grounds for certiorari specified in *Rule 38(5)* have been made to appear, and they are non-existent.

(6.) *Gen. Am. Tank Car Corp. v. El Dorado Term. Co.*, 308 U.S. 422.

The Court of Appeals properly disposed of the case, and the petition should be deined.

Respectfully submitted,

JAMES E. LYONS
Counsel for Respondent

JOHN S. BELFORD
Of Counsel

Dated: San Francisco, Calif.
July 5, 1946.

(APPENDIX FOLLOWS)



APPENDIX

CHAP. 3594.—An Act to prevent cruelty to animals while in transit by railroad or other means of transportation from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, and repealing sections forty-three hundred and eighty-six, forty-three hundred and eighty-seven, forty-three hundred and eighty-eight, forty-three hundred and eighty-nine, and forty-three hundred and ninety of the United States Revised Statutes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, whose road forms any part of a line of road over which cattle, sheep, swine, or other animals shall be conveyed from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, or the owners or masters of steam, sailing, or other vessels carrying or transporting cattle, sheep, swine, or other animals from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, shall confine the same in cars, boats, or vessels of any description for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner, into properly equipped pens for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented by storm or by other accidental or unavoidable causes which can not be antici-

pated or avoided by the exercise of due diligence and foresight: *Provided,* That upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart from any printed bill of lading, or other railroad form, the time of confinement may be extended to thirty-six hours. In estimating such confinement, the time consumed in loading and unloading shall not be considered, but the time during which the animals have been confined without such rest or food or water on connecting roads shall be included, it being the intent of this Act to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon the contingencies hereinbefore stated: *Provided,* That it shall not be required that sheep be unloaded in the nighttime, but where the time expires in the nighttime, in case of sheep the same may continue in transit to a suitable place for unloading, subject to the aforesaid limitation of thirty-six hours.

SEC. 2. That animals so unloaded shall be properly fed and watered during such rest either by the owner or person having the custody thereof, or in case of his default in so doing, then by the railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, or by the owners or masters of boats or vessels transporting the same, at the reasonable expense of the owner or person in custody thereof, and such railroad, express company, car company, common carrier other than by water, receiver, trustee, or lessee of any of them, owners or masters, shall in such case have a lien upon such animals for food, care, and custody furnished, collectible at their destination in the

same manner as the transportation charges are collected, and shall not be liable for any detention of such animals, when such detention is of reasonable duration, to enable compliance with section one of this Act; but nothing in this section shall be construed to prevent the owner or shipper of animals from furnishing food therefor, if he so desires." (34 *Stat.*, pp. 607, 608; 45 *USC*, Secs. 71 and 72)

SECS. 3, 4 and 5 (omitted).